

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ROBERT ELLIOT WOLFFE,) No. CV 13-06413-VBK
)
Plaintiff,) MEMORANDUM OPINION
) AND ORDER
v.)
) (Social Security Case)
CAROLYN W. COLVIN, Acting)
Commissioner of Social)
Security,)
)
Defendant.)
)

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") properly

1 rejected the opinions of Plaintiff's treating physicians,
2 Dr. Moe and Dr. Kramer;

3 2. Whether the ALJ erred in determining Plaintiff's
4 credibility;

5 3. Whether the ALJ erred in failing to find that Plaintiff's
6 anxiety was a severe impairment;

7 4. Whether the ALJ properly considered the combined effects of
8 Plaintiff's impairments when determining Plaintiff's
9 residual functional capacity; and

10 5. Whether the ALJ erred in relying upon the Vocational
11 Expert's testimony as the residual functional capacity
12 determined by the ALJ did not include all of Plaintiff's
13 impairments.

14 (JS at p. 3.)
15

16 This Memorandum Opinion will constitute the Court's findings of
17 fact and conclusions of law. After reviewing the matter, the Court
18 concludes that for the reasons set forth, the decision of the
19 Commissioner must be reversed and the matter remanded for further
20 hearing.
21

22 I

23 **THE ALJ IMPROPERLY REJECTED THE OPINIONS OF TREATING PHYSICIAN**

24 **DR. MOE AND TREATING PSYCHIATRIST DR. KRAMER**

25 Plaintiff's internal medicine doctor is Ardis Moe, who has
26 treated him at Northeast Valley Health Corporation since 2010. (AR
27 359.) The record contains two "Physician's Statements" from Dr. Moe.
28 The first is dated October 2010 (AR 198-199); the second was completed

1 in February 2011 (AR 226-227).

2 Following the ALJ's unfavorable decision, which was issued on
3 March 26, 2012 (AR 13-22), Plaintiff requested review by the Appeals
4 Council (AR 7), and submitted additional exhibits which were
5 considered but ultimately rejected. (AR 1-3.) The additional exhibits
6 include a letter of May 22, 2012 from Dr. Moe (AR 4, 359). In
7 addition, the Appeals Council considered a July 3, 2012 "Medical
8 Source Statement" from Dr. Moe (AR 360-362), and a "Medical Report on
9 Adult with Allegation of Human Immunodeficiency Virus (HIV)
10 Infection," dated August 24, 2012. (AR 356-358.)

11 Although the parties make only brief reference to these
12 additional evidentiary documents which were considered by the Appeals
13 Council, it is without doubt the law that this Court must consider
14 them in determining whether to affirm the decision of the
15 Commissioner. (See Brewes v. Commissioner of Social Sec. Admin., 682
16 F.3d 1157, 1159 (9th Cir. 2012) ("... when a claimant submits evidence
17 for the first time to the Appeals Council, which considers that
18 evidence in denying review of the ALJ's decision, the new evidence is
19 part of the administrative record, which the district court must
20 consider in determining whether the Commissioner's decision is
21 supported by substantial evidence."

22 Dr. Moe's Statements assess severe functional limitations. Had
23 they been viewed as substantial evidence by the ALJ, undoubtedly this
24 would have had an effect, at the least, on the assessment of
25 Plaintiff's Residual Functional Capacity ("RFC"); however, the ALJ
26 determined to give Dr. Moe's assessments of 2010 and 2011 "little
27 weight." (AR 20.) In fact, Dr. Moe's opinions were completely
28 discredited by the ALJ.

1 Unquestionably, Dr. Moe functioned as one of Plaintiff's treating
2 physicians. According to established Social Security regulations and
3 Ninth Circuit case law, the opinion of the treating physician normally
4 is entitled to significant weight. As set out in 20 C.F.R. §
5 404.1427(e)(3)(F)(2)(2)(ii),

6 "[U]nless the treating source's opinion is given controlling
7 weight, the administrative law judge must explain in the
8 decision the weight given to the opinions of State Agency
9 medical or psychological consultant or other program
10 physician or psychologist, as the administrative law judge
11 must do for any opinion from treating sources, non-treating
12 sources, and other non-examining sources who do not work for
13 us."

14
15 Where a treating physician's opinion is contradicted, the ALJ
16 must articulate specific and legitimate reasons supported by
17 substantial evidence in the record. See Carmickle v. Commissioner,
18 Social Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008); citing Lester
19 v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1995).

20 The Court's role is to determine whether the stated reasons
21 provided by the ALJ meet the tests established by Social Security
22 regulations and Ninth Circuit case law. As such, the Court must
23 identify the reasons stated in the decision, and evaluate them under
24 the appropriate standards.

25 Looking at this decision, there are exactly two reasons provided
26 by the ALJ for rejecting Dr. Moe's conclusions. These are the
27 following:

28 1. "The source provided no treating records and gave only

1 diagnoses as the basis for his conclusions [exhibit
2 references omitted];"

3 2. "Furthermore, the opinions cover a period of less than
4 twelve months, ..."

5 (AR 20.)

6
7 The above two reasons are not factually supported by the record.
8 As to the first reason, it is clear that Dr. Moe's opinions are
9 accompanied by substantial longitudinal treatment records. These
10 include chart notes from July 6, 2010 to November 8, 2011, and
11 laboratory results which accompanied the chart notes. (See, AR 280-
12 297.) These are in fact treating records, and it was the ALJ's
13 responsibility to evaluate them under applicable law and regulations.
14 In response to Plaintiff's argument, however, the Commissioner
15 misconstrues the applicable law, citing Batson v. Commissioner of
16 Social Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004),
17 for the proposition that an ALJ may discredit a treating physician's
18 opinion if it is conclusory, brief and unsupported by the record as a
19 whole, or by objective medical findings. The Commissioner invites this
20 Court to do its own independent examination of these treating records
21 to make a determination whether or not they are supportive or not
22 supportive of Dr. Moe's conclusions. But that is not the role of the
23 Court. The ALJ must perform that function, and then articulate why he
24 finds that the treating records do not support the physician's
25 conclusions. Then, this Court must evaluate whether the reasons
26 articulated in the decision are specific and legitimate. That cannot
27 occur here, because the ALJ erroneously concluded that there were no
28 treating records.

1 As to the second reason, it is clear that Dr. Moe treated
2 Plaintiff for a period of more than 12 months. The Commissioner
3 implicitly recognizes that there was a sufficient longitudinal period,
4 but argues that, "Plaintiff inaccurately contends that Dr. Moe's chart
5 notes from July 2010 to November 2011 [AR 280-297] provide sufficient
6 support for her severely restrictive opinions ..." (JS at 19.)

7 Thus, whether or not Dr. Moe's opinions were contradicted by the
8 opinion of a consultative examiner is not the issue. This is a
9 reviewing court, not a fact-finding court. While an ALJ may, in a
10 particular case, determine to accept, in whole or in part, the
11 opinion of a consultative examiner over that of a treating physician,
12 that can only be accomplished if the ALJ articulates reasons that are
13 supported by regulations and are in accord with well-established Ninth
14 Circuit law. That did not occur here, and for that reason, remand for
15 a new hearing is required.

16 With regard to treating psychiatrist Dr. Kramer, the ALJ's
17 decision is not sustainable, for the same reasons as the Court has
18 articulated as to Dr. Moe. With regard to Dr. Kramer, the ALJ
19 determined to give his opinion "little weight" based on one stated
20 reason:

21 "The source's assessment imposes limitations that exceed
22 even those that the claimant alleged."
23 (AR 21.)

24 The Court will not belabor the point, but this is not a "specific
25 and legitimate" reason to outright reject the opinion of a treating
26 source.

27 Dr. Kramer, a board-certified treating psychiatrist, completed a
28 Psychiatric Medical Source Statement on December 30, 2011. (AR 227-

1 329.) Dr. Kramer treated Plaintiff at the Northeast Valley Health
2 Center for psychiatric conditions which included depression and
3 anxiety. Before treating with Dr. Kramer, Plaintiff had received
4 psychiatric treatment at the same facility from Dr. Pariewski, also
5 board-certified as a psychiatrist. There are psychiatric progress
6 notes from Dr. Pariewski in the record documenting treatment afforded
7 to Plaintiff between July 2010 and November 2010. (AR 214-225.) The
8 ALJ's decision is further deficient because there is no comment
9 whatsoever in it relating to Dr. Pariewski's treatment record. Dr.
10 Pariewski's "Psychiatric and Medical Source Statement" is quite
11 specific in documenting "marked" limitations in most identified areas
12 of mental functioning. (AR 328.)

13 The ALJ had the responsibility to analyze Dr. Kramer's opinion,
14 and in particular, to determine how it compared to opinions rendered
15 by Plaintiff's prior treating psychiatrist, Dr. Pariewski. This did
16 not occur, as the Court has noted with regard to the single reason
17 cited in the ALJ's decision to outright reject Dr. Kramer's opinion.
18 Dr. Kramer also provided an opinion as to Plaintiff's functional
19 limitations from a psychiatric perspective. (Id.)

20 With regard to the ALJ's stated reason to reject Dr. Kramer's
21 opinion (that it indicated a greater level of limitation than
22 Plaintiff himself claims), the Court does not find that to constitute
23 in and of itself substantial evidence to outright reject the opinion
24 of a treating psychiatrist. While this may be evidence that can be
25 considered in conjunction with other evidence, it is not credible to
26 postulate that an individual's own self-diagnosis as to his mental
27 condition should be compared with the opinion of a treating
28 psychiatrist to determine whether the latter opinion should be

1 disregarded. The Commissioner cites no case law that would support
2 such a proposition, and the Court is not aware of any. The
3 Commissioner's invitation to the Court to do an independent evaluation
4 of the mental health treatment notes in the record which constitute a
5 function that is not within its purview. (See JS at 21, et seq.)

6 The Court's determination that this matter must be remanded for
7 a de novo hearing, based upon error committed in the Commissioner's
8 evaluations of Plaintiff's treating psychiatrist and treating
9 physician, becomes dispositive as to the remaining issues, which the
10 Court will, therefore, only briefly address, since, as noted, this
11 matter must be subjected to a new, de novo hearing on all issues
12 pertaining to asserted disability.

13 Certainly, the third issue, which asserts error because the ALJ
14 failed to find that Plaintiff's anxiety was a severe impairment, is
15 effectively encompassed within the Court's conclusions as to the first
16 issue, since Plaintiff's treating psychiatrist did find that Plaintiff
17 has severe anxiety; however, the ALJ, as noted, improperly determined
18 to reject the opinion of Dr. Kramer.

19 With regard to the credibility issue (Issue two), the ALJ's
20 stated reasons to depreciate Plaintiff's credibility rely largely on
21 lack of objective medical evidence and a sparse treatment history.
22 Again, these issues directly relate to the opinions of Plaintiff's
23 treating physicians, which the Court has determined were invalidly
24 rejected or depreciated.

25 The Court will, however, note that on remand careful attention
26 should be paid to whether the extent or lack of extent of Plaintiff's
27 treatment is related to a financial inability to pay.

28 Further, the Court will note its concerns with the ALJ's

1 evaluation of Plaintiff's activities of daily living ("ADL"). On
2 remand, careful attention should be paid to a proper evaluation of
3 this factor vis-a-vis the determination of Plaintiff's credibility.

4 With regard to Issue five, which asserts that it was erroneous
5 for the ALJ to rely upon the vocational expert's ("VE") testimony in
6 determining residual functional capacity because the hypothetical
7 questions failed to include all of Plaintiff's impairments, that
8 issue, again, is integrally related to the first issue, which concerns
9 the opinions of Plaintiff's treating physicians. Consequently, the
10 Court need not discuss it further, as any hypothetical questions which
11 might be posed in a de novo hearing to a VE will depend upon and
12 certainly be related to the ALJ's determination of the opinions of the
13 treating physician and psychiatrist.

14 For the foregoing reasons, the Court determines that this matter
15 must be remanded for a de novo hearing. On remand, none of the
16 findings reached by the ALJ in this current case will be relied on as
17 a basis for determination of disability issues.

18 **IT IS SO ORDERED.**

19
20 DATED: July 8, 2014

21 /s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE